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Jay Leo Rothschild

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No. 1

CONTRIBUTION BETWEEN TORT-FEASORS

(A CONSIDERATION OF CIVIL PRACTICE ACT, SECTIONS 211A
AND 193 IN THE LIGHT OF ARTICLE 8 OF THE
DEBTOR AND CREDITOR LAW.)

[SEE OPPOSITE PAGE]

A.

C. P. A., SEC. 211a.

WHEN section 211a of the Civil Practice Act was enacted by the legislature,¹ a great mystery was propounded to bench and bar. An Houdini could not have conjured up a reality more tantalizing to the rational mind. There it was and is, unannounced, unheralded, unexplained. Its origin is unknown; its purpose obscure; its very phraseology involved in contradictions of settled conceptions. Though much has been written about it, it is striking that no judge and no court has considered or discussed its metamorphosis, though this is the standard approach in the interpretation of any new statute. Painstaking search fails to reveal any trace of its conception. It is like an illegitimate child—to be accepted as a fact; its origin a subject of some embarrassment.

That legislation can thus be thrust upon us, without explanation of any kind, is indeed an indictment of the entire system of enacting law, both substantive and procedural.

But the present problem is not whence this statute came, but what to do with it. Yet, to know something of its origin, something of the setting in which it was conceived, would

¹L. 1928, c. 714.

undoubtedly point to its proper interpretation. The presumption of legitimacy is indeed strong and powerful; yet reason requires that some plausibility there must be.

It is in this spirit that we present this record of our uncharted course, for we are not certain that we have our bearings, nor that we have correctly estimated the port of origin or of destination of this most perplexing statute. With no land in sight and neither the sun nor the moon nor the stars to guide us, it should not be at all surprising if we wandered and lost our way.

Yet we have observed bits of flotsam and jetsam which, to the watchful and eager wayfarer, gives hope that safe port is at hand. As an hypothesis, therefore, to be disowned even by us if future soundings require it, we venture to reflect the entries in our log. Our own first impressions we have had to modify, though we have only changed the reasons and still cling—we hope not too stubbornly—to our original conclusions.² Perhaps the process must still go on.

By way of introduction, it is well to have the new statute before us:

“211a. Action by one joint tort-feasor against another.

Where a money judgment has been recovered *jointly* against two or more defendants in an action for a personal injury or for property damage, *and such judgment has been paid* in part or in full by one or more of such defendants, *each defendant who has paid more than his own pro rata share shall be entitled to contribution* from the other defendants with respect to the excess so paid over and above the *pro rata* share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his *pro rata* share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice.”

² Rothschild, *The Consolidated Action* (1929) IV ST. JOHN'S L. REV., 151.

It will be observed that this section is headed, in the Civil Practice Act, not "contribution" between tort-feasors, but "Action by one joint tort-feasor against another." Judging by the title alone, there was no attempt to promulgate a new rule of substantive law, and one should not expect it in a procedural statute. And the language of the statute is such that it suggests the strong possibility that the substantive rule of contribution is to be found elsewhere. It provides that where a *joint judgment* has been obtained against tort-feasors, and one has paid the judgment in whole or in part, he may recover such excess which he had *paid* above his "*pro rata share*" from the other tort-feasors against whom joint judgment was rendered, by motion in the action, or in a separate action. The impression is rather striking that the statute provides a procedural method for expeditious disposition of a claim for contribution, the right to which is assumed, rather than that it promulgates a rule permitting contribution between tort-feasors for the first time. For what is the "*pro rata share*" of a joint tort-feasor? Is he not liable for the whole judgment, and in the absence of any assumption that there is any right to contribution between joint tort-feasors, as in the case of joint, several or joint and several obligors, does the expression "*pro rata share*" have any proper significance at all?

Furthermore, does the statute abolish the well settled distinction between tort-feasors *in pari delicto* and all others, so that, whereas under our former law a joint tort-feasor could recover the whole amount from another, where the fault was solely that other's, he can now recover only one-half? ³

It seems apparent that section 211a, in treating of the right of contribution between tort-feasors against whom a joint judgment has been rendered and paid by one of them, describes the characteristics of the obligation in terms applicable only to joint, several, and joint and several *contractual* obligations. As to them, it is not a novel concept but quite an accepted one, that each obligor is a principal as to his *pro rata* share, and surety as to the balance. But this proceeds on the assumption of an underlying obligation of

³ *Oceanic Steam Navigation Co. v. Compania Transatlantica Espagnola*, 134 N. Y. 461, 31 N. E. 987 (1892).

contribution. There was no such thing as contribution between tort-feasors *in pari delicto*.⁴ There was only indemnity of those responsible to the others.⁵ Is there now not only "contribution" between tort-feasors *in pari delicto*, but also *only* contribution between tort-feasors who are not *in pari delicto*, or may there still be complete indemnity of one such as against the other? And what is it in any event that measures a joint tort-feasor's pro rata share?

B.

ARTICLE 8, DEBTOR AND CREDITOR LAW.

In search for an answer to this question, we come upon the new Article 8 of the Debtor and Creditor Law. We observe, in the first place, that it, like section 211a of the Civil Practice Act, was also adopted in 1928. Chapter 833 of the laws of that year ushered it in, whereas it was Chapter 714 of the laws of 1928 which introduced section 211a of the Civil Practice Act. The Debtor and Creditor Law change became effective on the date of its approval by the governor, *i.e.*, on April 6, 1928, whereas C. P. A. section 211a, though approved earlier, on March 18, became effective only on September 1 of that year. Further, we know that the two statutes were concurrently considered, because the Debtor and Creditor Law was the first to pass the Senate on March 12 while C. P. A. section 211a passed the Senate last on March 22; whereas in the Assembly it was C. P. A. section 211a which passed first, *i.e.*, on March 13, whereas the Debtor and Creditor Law passed last, *i.e.*, on March 21. We observe next that, for the first time in this state, this statute formulating the rules for the "Discharge of Joint Obligors" specifically provides that "In this article, unless otherwise expressly stated, 'obligation' includes a liability in tort; 'obligor' includes a person liable for a tort; 'obligee' includes a person having a right based on a tort. 'Several obligors' means obligors severally bound for the same performance."⁶

⁴ WILLISTON, CONTRACTS (1924) §345.

⁵ *Supra* note 3.

⁶ N. Y. DEBTOR AND CREDITOR LAW, L. 1928, c. 833, §231.

And this standard seems to be systematically carried out. For in the case of the death of a joint obligor, the rule that "his estate shall be bound as such jointly and severally with the surviving obligor or obligors" is strictly limited to the case of the death of "a joint obligor *in contract*,"⁷ for obviously the death of a tort-feasor, at least in personal injury actions, ends his obligation.⁸

Finally, we know that the judicial mandate is that, if possible, this statute should be read together with C. P. A. section 211a:

"Statutes enacted at the same session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes *in pari materia*. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session."^{8a}

"The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each; if, however, they are necessarily inconsistent, a statute which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature; and of two inconsistent statutes enacted at the same session, that will prevail which takes effect at the later date."^{8b}

⁷ *Ibid.* §236.

⁸ But, even here, the statute is not free from confusion, because in this state, the death of a joint tort-feasor, guilty of property damage, does not necessarily end his obligation (*Mayer v. Ertheiler*, 144 App. Div. 158, 128 N. Y. Supp. 807 (1st Dept. 1911)). But, perhaps, it was the object of the statute, in section 236 to deal only with joint contracts, since a joint tort-feasor would in reality be jointly and *severally* liable, and not merely *jointly*.

^{8a} *Smith v. The People*, 47 N. Y. 330, 339.

^{8b} 39 Cyc. 1151.

But even with this standard in mind, what is accomplished by the new Debtor and Creditor Law, or what was intended, is not free from doubt.

Quite unlike section 211a, though adopted by the same legislature, it has a known history and background. It is one of the "uniform" laws promulgated as the "Uniform Joint Obligations Act" by the National Conference of Commissioners on Uniform State Laws. It was drafted by Professor Williston and finally formulated in 1925. It is fair, therefore, to look for its interpretation, or for suggestion as to its purpose, to the monumental treatise of the author of the statute, on the law of contracts. Indeed, in one of the reports of the American Bar Association⁹ the suggestion is made that the common-law confusion which occasioned the drafting of the statute might be found described in Professor Williston's exposition of the subject in the *Law of Contracts*. Indeed, the report^{9a} of the Reasons for the Adoption of the Uniform Joint Obligations Act (Article 8 of our Debtor and Creditor Law) is substantially a reprint of section 336 of Williston on Contracts.

Reference to Williston on Contracts shows that that learned author treats of the joint obligations of tort-feasors as based on the same principles as the contractual obligations of joint debtors. So he says:

"The liability of two or more persons jointly concerned in committing a tort is joint and several; and, for the same reason, as in the case of parties jointly and severally liable in contract, a release of one discharges all. There seems also no reason of technical principle to distinguish the effect of a covenant not to sue or a release of one of several obligors under a joint and several liability in tort with a reservation of rights against the others from the effect of a similar release given to a joint and several contractor, and many decisions, accepting the analogy, permit an action to be maintained subsequently against the other tort-feasors, where one jointly and severally liable

⁹ Vol. 50 (1925) p. 588.

^{9a} Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings (1925).

with them for the tort has been given a covenant not to sue him or a qualified release.”¹⁰

No reference here to “judgment” as distinguished from “liability.”

As to contribution between joint debtors the learned author had said in a previous section :

“Again it is said that other joint debtors are discharged because the right of contribution of the other joint debtors against the one released would thereby be wrongfully discharged, but, as has been pointed out, no release by the creditor of one joint debtor could affect the right of contribution belonging to the other joint debtors. In so far as the joint debtors not released are not principal debtors they necessarily have a right of contribution or of indemnification which cannot be taken away from them without their consent.”¹¹

So, in later treating of the effect of payment by one of several debtors, no discrimination is made between joint contract debtors and joint tort-feasors :

“But in the absence of a clear evidence of a contrary intention, where a creditor covenants not simply for temporary forbearance, but permanently never to sue one of several debtors, it should be presumed that the payment made by that debtor in consideration for the covenant is a payment on account of the debt, and therefore to that extent the debt is discharged as to all the debtors.”¹²

And significantly, in the footnote appended to this statement, cases involving joint tort-feasors are cited. So it is said :

“ * * * In *Nashville Interurban R. v. Gregory*, 137 Tenn. 422, * * * the court, however, refused to request

¹⁰ WILLISTON, *op. cit.* *supra* note 4, §338 (a).

¹¹ *Ibid.* §333.

¹² *Ibid.* §341.

a credit by the plaintiff in favor of the defendant of a sum received from another joint tort-feasor in exchange for a covenant not to sue. The court somewhat confused the two distinct questions as to whether a covenant not to sue extinguished the cause of action, and whether a payment received for such a covenant should be regarded as part payment on account of the joint liability of the tort-feasors. It is expressly provided in some of the statutes referred to that credit shall be given for payments by a joint debtor."¹³

It should be noted that the New York law is in accord with Professor Williston's criticism.¹⁴

In shifting the point of view so as to observe the relationships of the co-debtors to each other, instead of their obligations merely to the creditor, still there is no discrimination between joint tort-feasors and joint contractual debtors:

"The effect of a covenant not to sue one of several co-debtors or of a release of one with a reservation of rights against the others has been considered from the aspects of a creditor. The same question may be considered from the aspect of the debtor who has received the covenant or release; and it may be premised that if the undischarged co-debtors are forced by any means without their consent to pay more than their share of the debt, they can in turn enforce a claim for contribution against the debtor or debtors who received the covenant or qualified release."¹⁵

Of the fact that our new Article 8 of the Debtor and Creditor law is rooted in the philosophy of Professor Williston as thus stated, there can be no doubt. The very phraseology of the statute shows its indebtedness to identical authorship. The phrase "contract or relation" used in the statute is the very one employed by Professor Williston:

¹³ *Ibid.* footnote 80.

¹⁴ *Gaetjens v. New York*, 145 App. Div. 640, 130 N. Y. Supp. 405 (1st Dept. 1911); *Knapp v. Roche*, 94 N. Y. 329 (1884).

¹⁵ *Supra* note 4, §342.

"Though a creditor may exact full payment of the whole debt, by levy of execution or otherwise, from one only of those severally or jointly, or jointly and severally, liable to him, and cannot be compelled to confine his resort to each to that amount which as between one another each debtor ought to pay an obligor who is compelled by the creditor to pay in excess of the share, proper as between himself and his co-debtors, is entitled to contribution or indemnification from the other obligors *according to his contract or relation with them*. * * * As between obligors who are equally interested or equally without interest the duty to bear the burden is equal, and contribution will be enforced in favor of one who has paid more than his proportion against others who have paid less. * * * It may be added finally to avoid misapprehension, that no right of contribution exists between joint tort-feasors who are *in pari delicto*." ¹⁶

It will be observed that the word "relation" would certainly embrace the status of joint tort-feasors, and that Professor Williston expressly realizes this, for he takes care to point out "that no right of contribution exists between joint tort-feasors who are *in pari delicto*." This would seem to express recognition, therefore, of the fact that his discussion does embrace tort-feasors not *in pari delicto*.

There is therefore little doubt that Article 8 of the Debtor and Creditor Law embraces and was intended to include the obligations of joint tort-feasors as well as of joint debtors, at any rate, those joint tort-feasors not *in pari delicto*. But since there undoubtedly was no right of contribution at common law between joint tort-feasors *in pari delicto*, the question presented is indeed a serious one as to whether Professor Williston, who drafted the new statute on Joint Obligations, intended to create the right of contribution as between joint tort-feasors, or whether, in this respect, he intended merely to reflect the common law, and was led into unfortunately ambiguous phraseology by his own theory that the fundamentals of joint obligations in tort

¹⁶ *Ibid.* §345.

and contract were the same. Assuming, as is not impossible (though unlikely) from his discussion of the subject, that he intended to create contribution between tort-feasors *in pari delicto* as distinguished from indemnity between tort-feasors, not *in pari delicto*, the question is nevertheless a serious one as to whether the legislature intended to and did accomplish that purpose.

And at the outset it must be admitted to have striking significance that nowhere in the discussions of the Conference of Uniform Laws is there a suggestion of any attempt to create the right of contribution between joint tort-feasors *in pari delicto*. Yet this is not decisive, because, in these reports neither is there any trace of a purpose to embrace the topic of indemnity between tort-feasors not *in pari delicto*. Indeed, all the discussions reported are of little or no consequence—amazingly so, when it is remembered how complex is the entire subject of joint obligations. Indeed, nowhere have we been able to find, in the consideration of the statute, even a hint as to why tort-feasors as distinguished from *judgment-debtors* (cf. C. P. A., sec. 211a) who were tort-feasors, were expressly included within the scope of the statute.

The new Article 8 of the Debtor and Creditor Law, in a very able discussion of the subject, has been so construed that it "does not deal with the creation of the relationship, nor with the parties who may be joint obligors." In this sense it has been said that "It deals solely with the rights and liabilities of the parties after that relationship has been created, or, more particularly, it deals with the effect of judgments, part payments, releases, and the death of a joint obligor. * * *" Although the new Joint Obligations Act by definition makes "obligation," "obligor" and "obligee" include tort rights and liabilities, it is questionable whether the defenses of this section will be available in tort cases.¹⁷

But this ignores the plain and express language of the statute which for the first time brings the tort-feasor within the category of joint obligors. And it will be noted that this is a tort-feasor whose liability is not authenticated by a judgment against him. In order to be a joint obligor under this

¹⁷ Note (1928) 13 CORN. L. Q. 640.

statute it is not necessary that his liability be merged in a judgment which might be said to have contractual nature.¹⁸ This surely is the creation in a very real sense of the relationship itself.

On the other hand, it is quite true that if the purpose of the draftsman was to create the obligation of contribution between tort-feasors *in pari delicto*, the phraseology used was vague and inept. If it was the purpose of this statute to settle problems, it may be fairly said of this one, as of many others, that it more than compensated for all that it settled by those which it raised anew. To us it seems that the statute may be given operation—even with due respect to the definition of joint obligors to include joint tort-feasors—if it be deemed only to regulate the obligations of debtors (including tort-feasors), not as between themselves, but only to the creditor.

So it may be said that all the statute accomplishes in this respect is to state the rules as to the effect of a release without reservations, or of one with reservations, and to give a joint tort-feasor the benefit of any payment made by another joint tort-feasor.¹⁹

Such an interpretation would make the statute largely declaratory of existing law. But this is not a wholly satisfying result, because if it were not intended to completely assimilate the rules as to joint tort-feasors with those as to joint debtors on the principle of contribution, much of the statute as applied to tort-feasors is quite confused, if not meaningless. So section 233 requires that the "amount or value of any consideration received by the obligee (including of course a tort obligee) from one or more of * * * obligors (including of course a joint tort-feasor) shall be credited to the extent of the amount received on the obligations of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of surety." This means nothing as to joint tort-feasors *in pari delicto* unless we infer that as to them (by the fact of payment, and

¹⁸ A judgment, though predicated on a tort liability, may, for many purposes, be deemed a contract. This is quite settled. The rule has been applied to judgments based on tort. *Mecum v. Becker*, 164 App. Div. 852, *aff'd*, 215 N. Y. 691, 109 N. E. 1084 (1915).

¹⁹ *Supra* note 6, §§234, 235, 233.

irrespective of the compulsion of any judgment), as in the case of joint or joint and several obligors, there is the obligation of contribution so that for all in excess of the *pro rata* share of each tort-feasor, he is a surety as distinguished from a principal debtor. And it means as little with respect to joint tort-feasors not *in pari delicto*, because in such case, as we have seen,²⁰ one is entitled, not merely to a *pro rata* share, but to complete indemnity from the other, and the relation is certainly not one which may be differentiated on any principle of suretyship.

Similarly, sections 234 and 235 of the statute are as follows:

"234. Discharge of one obligor, with reservations. Subject to the provisions of section two hundred and thirty-three, the obligee's release or discharge, of one or more of several obligors, or of one or more of joint, or of joint and several obligors shall not discharge co-obligors, against whom the obligee in writing and as part of the same transaction as the release or discharge, expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section two hundred and thirty-five.

"235. Discharge of one obligor, without reservations. (a) If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor, *then knows or has reason to know that the obligor released or discharged did not pay so much of the claim as he was bound by his contract or relation with that co-obligor to pay*, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.

(b) If an obligee so releasing or discharging an obligor has not then such knowledge or reason to know, the obligee's claim against the co-obligor shall

²⁰ *Supra* note 3.

be satisfied to the extent of the lesser of two amounts, namely, (1) the amount of the fractional share of the obligor released or discharged, or (2) *the amount that such obligor was bound by his contract or relation with the co-obligor to pay.*" (Italics ours.)

What can section 235 mean as to joint tort-feasors *in pari delicto* if there is no right of contribution between them irrespective of and prior to a joint judgment? Does a joint tort-feasor *in pari delicto* "know(s) or have reason to know that the obligor released or discharged did not pay so much of the claim as he was bound by *his contract or relation with that co-obligor to pay?*" If there is no general obligation of contribution between tort-feasors *in pari delicto* (other than created by a joint judgment), then such tort-feasor is never bound to pay anything to his co-tort-feasor. But this reasoning would completely nullify not only section 235, but also section 234 as far as joint tort-feasors *in pari delicto* are concerned, and moreover would make the definitions contained in section 231 (which have the express purpose of including joint tort-feasors) a perfectly meaningless collection of mere words. Furthermore, even with respect to tort-feasors not *in pari delicto*, the statute creates nothing but confusion, because in such case there is no such concept as that of a "*pro rata* share." In such case, it is complete indemnity or nothing.

The only escape from this reasoning is in the contention that the statute, as we now have it, does not refer to tort "*liabilities*" but *judgments* predicated on torts, thus interpreting Article 8 of the Debtor and Creditor Law (effective in April, 1928) by the standard set by section 211a of the Civil Practice Act (effective six months *later i. e.* in September,²¹ 1928). Such was the construction of the old Debtor and Creditor Law,²² and the old statute expressly provided, upon this assumption, that "An instrument making a composition with a creditor does not impair the creditor's right of action against any other joint debtor, or his right to take any

²¹ Yet the rotation of chapter numbers would be quite consistent for it was chapter 714 which enacted C. P. A. section 211a and chapter 833 which enacted article 8 of the DEBTOR AND CREDITOR LAW.

²² *Supra* note 18.

proceeding against the latter; unless an intent to release or exonerate him, appears affirmatively upon the face thereof."²³ But this statute had not stipulated that joint debtors should include joint tort-feasors. A joint tort-feasor became a debtor only when judgment was rendered against him. Then the distinction between tort-feasors *in pari delicto* and those not *in pari delicto* did not confuse, because the statute dealt only with the rights and obligations of a creditor with respect to whom the statute made the distinction of no importance because the creditor's state of knowledge (as in the present statute) was not the test. "The foundation of the claim may have been in tort, but the judgment created a joint debt to which sections 230 to 233 of the Debtor and Creditor Law (Consol. Laws, chap. 12; Laws of 1909, chap. 17) apply."²⁴ The present statute, however, does not refer to *judgments*, but to "a liability in tort" or "a person liable for a tort" or "person having a right based on a tort."²⁵

Indeed, it seems quite plain that the draftsman of the statute (irrespective of what may have been his intention) reflected a set of rules without discrimination, in these respects, as between joint debtors and joint tort-feasors. For when he means only joint *contract* debtors, he is careful to note the limitation.²⁶ Otherwise, as in his treatise, no discrimination is made. If he intended only to formulate rules as between creditor, on the one hand, and debtors, on the other, he became involved in the cross currents inevitably created. To regulate and direct the rules obtaining as between the creditor and his debtors, inevitably resulted in disturbing the relationship between the debtors themselves.

The argument is thus fairly worthy of consideration as to whether it is not the new Article 8 of the Debtor and Creditor Law which supplies the standard of contribution between joint tort-feasors. But strong doubt there nevertheless must be because such was not the rule at common law, and we should have expected plain language on such an important

²³ N. Y. Con. L., c. 12; Laws of 1909, c. 17, §231 of the old DEBTOR AND CREDITOR LAW.

²⁴ Scott, J. in *Mecum* case, *supra* note 18.

²⁵ *Supra* note 6, §231.

²⁶ *Supra* note 6, §236.

change.²⁷ But that the language is not unequivocal is not conclusive as in many other instances in statutory construction.²⁸ For here, unless it was intended to create the rule of contribution between joint tort-feasors, there is much in the statute that is inept and inexplicable.

Statutes have been construed to be valid and coherent with other statutory enactments on no more than is present here.²⁹

We thus have the curious situation that by equally persuasive considerations, the Debtor and Creditor Law may or may not be construed to imply the new right of contribution between joint tort-feasors, depending upon the setting in which it is found, and the purpose which it was sought to accomplish. It would not be difficult to conclude that it was intended to create contribution between joint tort-feasors. It would be quite as simple to come to an opposite conclusion. The task is to find the guide to decision.

C.

C. P. A., SECTION 211a, AND THE DEBTOR AND CREDITOR LAW.

It is in this light, then, and pursuant to the standard set by our Court of Appeals, that we approach the more careful consideration of section 211a:

“In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system.

²⁷ *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837 (1916); *Hopkins v. Lincoln Trust Co.*, 233 N. Y. 213, 135 N. E. 267 (1922).

²⁸ *Matthews v. Matthews*, 240 N. Y. 28, 147 N. E. 237 (1925).

²⁹ *Ibid.*

Resort may be had to every part of a statute, or, where there is more than one in *pari materia*, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent.' (*Kohlsaat v. Murphy*, 96 U. S. 153, 159; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 662.)" *Matthews v. Matthews*.³⁰

We doubt that it is a mere accident that section 211a was adopted by the same legislature which adopted the new Article 8 of the Debtor and Creditor Law. Common impulse there must have been and was, which gave rise to both, but which the cause and which the result, which the foundation and which the superstructure, is the problem to be determined. The question is as to whether Civil Practice Act section 211a was intended to be a procedural supplement to Article 8 of the Debtor and Creditor Law, or a new rule of substantive law, resting upon or collateral to Article 8 of the Debtor and Creditor Law, and incorporated in the Civil Practice Act for want of choice of a more appropriate resting place.

If it can be read as a procedural supplement to that statute, it would be the more desirable result and more in accord with the normal standard of statutory construction. We may even grant, from this point of view, that when the legislature adopted section 211a, it may have misread and misinterpreted the effect of Article 8 of the Debtor and Creditor Law, in supposing that it introduced the principle of contribution generally. A uniform law, thus transplanted to a new setting, would take on a new meaning, otherwise unjustified. In such case, the effect would be correctly to interpret section 211a as a supplement to Article 8 of the Debtor and Creditor Law, though, without section 211a, Article 8 of the Debtor and Creditor Law would take on no such meaning. But this would be sound statutory construction, for whether or not predicated on an erroneous assumption of the meaning of Article 8 of the Debtor and Creditor Law, such a conclusion would, nevertheless, repre-

³⁰ *Ibid.* at 35, 147 N. E. at 238.

sent the intention of the legislature, fallacious and unfortunate though it may have been. It is not sound principle, nor infallible construction of an unrelated statute, which we seek, but the intention of the legislature, as gathered from its enactments in related settings, whether we like it or understand it or not.

So viewed, section 211a of the Civil Practice Act illumines Article 8 of the Debtor and Creditor Law and the said provisions of that law enlighten us on the proper interpretation of section 211a.

It is quite true, however, that reading section 211a alone, in the light of the *old* Debtor and Creditor Law, which considered a joint tort-feasor a joint debtor only when he had been cast in judgment so that then he might be responsible for "his ratable portion of the joint debt,"³¹ "his own *pro rata* share" to his joint tort-feasors as described in section 211a might well be his proportion of the liability as fixed by the *judgment*, though there was no liability *to them* before judgment. But, read in the light of the *new* Debtor and Creditor Law which refers to "so much of the claim as he was bound by his contract or relation with that co-obligor to pay,"³² it is impossible to come to such conclusion, because by the express words of the statute it is the "contract or relation," and not any judgment entered thereon, which fixes the liability of one obligor to another.

So interpreted, section 211a of the Civil Practice Act is the procedural supplement to the new Article 8 of the Debtor and Creditor Law, and this is consistent with its being placed in the Civil Practice Act instead of in the Debtor and Creditor Law. So read in the light of the Debtor and Creditor Law, it does not provide that there is and can be no contribution except where the joint tort-feasors have had a joint judgment rendered against them, and one of them has paid more than his *pro rata* share, but that in a case where it so happens that a joint judgment has been rendered, and that one of the tort-feasors has paid more than his *pro rata* share, he may have relief by *way of motion* in the original action if all the tort-feasors have appeared, and

³¹ *Supra* note 23, §233.

³² *Supra* note 6, §235.

is not necessarily relegated to an independent action, unless they have not all appeared. This interpretation would give both section 211a and the new Article 8 of the Debtor and Creditor Law full meaning, whereas, interpreted as permitting contribution only as between joint tort-feasors against whom a joint judgment has been entered, it renders section 211a harsh, arbitrary and discriminatory,³³ and the Debtor and Creditor Law an amazing example of statutory ineptness.

Nor is this view as radical as may appear at first blush, for it is strengthened by a consideration of the basis of the rule of contribution, which makes it entirely unlikely that contribution would ever be sought, except by one who found himself with a joint judgment against him, which he has been compelled to pay. Even as among joint, several, or joint and several contract obligors, the right to contribution does not accrue until the obligor has made payment.³⁴ No less, then, should or can be the standard for the accrual of the right of contribution on the part of an obligor who is a joint tort-feasor. But, in his case it is only a *judgment* which can irrevocably fix the amount of his obligation, unliquidated until that event, whereas the contract joint debtor has a measure of his liability by the agreement of himself and his co-obligor with the obligee.³⁵ It follows, therefore, as a practical matter, that a joint tort-feasor, though he makes payment (without the compulsion of a judgment) has no way of fixing his ratable share except through a judgment taken against him. Therefore, it is not likely that he will be in a position to ask for his ratable contribution by *motion in an action* except where the obligation itself has been liquidated by a judgment taken jointly against himself and his co-tort-feasors.

Indeed, it is quite settled that a judgment against one of two joint tort-feasors, where the other is not a party, is not *res judicata* in a new action commenced against the

³³ *Supra* note 17 (footnote).

³⁴ *Fitch v. Fraser*, 109 App. Div. 440, *aff'd*, 188 N. Y. 605, 81 N. E. 1164 (1907); *Lee v. Larkin*, 125 App. Div. 302, 109 N. Y. Supp. 480 (3d Dept. 1908).

³⁵ *Williston, op. cit. supra* note 4, §345.

other.³⁶ Procedure by motion would, therefore, be quite inappropriate, except where a joint judgment has been rendered and the joint obligation, therefore, adjudicated. In other words, the likelihood is almost *nil* that a joint tort-feasor will find it necessary to ask for contribution, except where judgment has been rendered against him alone—a result which in practically every case he could avoid, by bringing in his co-tort-feasor as a joint defendant—which, in most instances, means joint judgment against himself and co-tort-feasors, if we may presume that a plaintiff would not deliberately forego a source of satisfaction of his judgment.

D.

SUBDIVISION 2 OF C. P. A., SEC. 193.

Before we proceed further, it is now necessary to consider the procedural method of bringing in a joint tort-feasor, where plaintiff has omitted to sue him. This statute is subdivision 2 of section 193 of the Civil Practice Act, which is now the battlefield upon which the issue of the proper interpretation of section 211a is being fought. The statute is as follows:

“2. Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against such party in the action, the court, on application of such party, may order such person to be brought in as a party to the action and direct that a supplemental summons and a pleading alleging the claim of such party against such person be served upon such person and that such person plead thereto, so that the claim of such moving party against such person may be determined in such action, which shall thereupon proceed against such per-

³⁶ *Old Dominion Copper Mining Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, *aff'd* 225 U. S. 111, 32 Sup. Ct. 641 (1911); *Tanzer v. Breen*, 131 App. Div. 654, 116 N. Y. Supp. 110 (1st Dept. 1909).

son as a defendant therein to such judgment as may be proper." ^{36a}

It will be observed that before this statute can apply it is necessary that "some third person * * * is or will be liable to such party (in this case, the defendant) wholly or in part" for the claim made against that defendant in the action. Taking this statute literally and supplying nothing by inference, it is plain that if there is no independent obligation of contribution between joint tort-feasors, there is and can be no authority for the granting of any motion made by one tort-feasor to bring in another as a party defendant, for there is no possibility under any known rule of law that a tort-feasor not a defendant "is or will be liable" to defendant.

On the other hand, if there is an independent obligation of contribution, clearly the joint tort-feasor not already a party to the action "is or will be liable" to defendant. Assuming, therefore, that there is no independent substantive rule of contribution between tort-feasors, it thus becomes necessary, if we would employ this statute, to read into it by implication that it is enough that the third person "is or will be liable" to defendant, *if* said third person is made a defendant. In this fashion, a substantive right is created by the procedural device of bringing in additional parties. This is a rather startling result, to say the least, *i.e.*, that a merely procedural device should create a substantive right. Yet this is exactly what has thus far occurred, for in the Fourth, Third and First departments it has been held that a joint tort-feasor may be brought in by a defendant for the very purpose of enabling the defendant to obtain contribution from his co-tort-feasors.³⁷ The rationale of these cases is stated in the able opinion of Mr. Justice Crouch in the *Haines* case:

^{36a} CIVIL PRACTICE ACT §193, subd. 2.

³⁷ *Haines v. Bero*, 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dept. 1930); *Schenck v. Bradshaw*, 251 N. Y. Supp. 316 (3d Dept. 1931); *Davis v. Hawk & Schmidt*, 232 App. Div. 556, 250 N. Y. Supp. 537 (1st Dept. 1931); decisions to the contrary, *e.g.*, *Troshow v. B. Altman & Co. (Frankenthaler, J., at Special Term, N. Y. County, 140 Misc. 420, 250 N. Y. Supp. 599 (1931))*, must be deemed overruled.

"The legislative purpose in the enactment of section 211a was to modify the ancient rule of law (see *Peck v. Ellis*, 2 Johns Ch. 131), under which there was no contribution between joint tort-feasors who were in *pari delicto*. We may assume, perhaps, that to the more tolerant modern mind the morality of that old doctrine seemed too stark and austere to be just. Mercy there may be even to a wrongdoer. The statute grants a *substantial* right. It was not intended, we think, that the opportunity of a defendant to utilize that right should depend solely upon the will of a plaintiff; nor should the courts thwart the legislative purpose by narrow interpretation of a practice rule nor by the use of a discretion too restricted in scope."³⁸

Neither this case nor any other considers the concurrent amendment of the Debtor and Creditor Law.

A contrary view, *i.e.*, that a defendant tort-feasor may not avail himself of subdivision 2 of section 193, has been taken only by courts at Special Term. Their view is, as put by Mr. Justice Frankenthaler in a recent case, that the *Haines* case "appears to overlook the fact that a joint judgment against both defendants, may not be had unless the plaintiff elects to demand it, which he may not be ordered to do without his consent."³⁹ But this criticism itself involves error, for it is quite settled that even if a third person be brought in on defendant's motion, pursuant to subdivision 2 of section 193, no joint judgment in favor of plaintiff against defendant and the impleaded party results, but only a separate judgment of defendant against said impleaded third person.⁴⁰ For that reason, it is difficult to see how the criticism just stated is appropriate, for plaintiff is not thus made a litigant against the impleaded tort-feasor. There would seem to be similar error involved in the recent

³⁸ *Haines v. Bero*, *supra* note 37, at 334, 335, 243 N. Y. Supp. 658.

³⁹ *Troshow v. B. Altman & Co.*, *supra* note 37.

⁴⁰ *Bozzuffi v. Darrieusecq*, 125 Misc. 178, 210 N. Y. Supp. 455 (1st Dept. 1925); *Otis Elevator Co. v. Miller*, 127 Misc. 421, 216 N. Y. Supp. 320 (1st Dept. 1926). The *Bozzuffi* case was referred to with approval in *Haines v. Bero Engineering Const. Co.*, 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dept. 1930).

decision at Special Term, Westchester County, denying an application made under subdivision 2 of section 193, because in such case "plaintiff thereby necessarily receives a money judgment contrary to his wish * * *."⁴¹

Plaintiff obtains no money judgment against the impleaded tort-feasor.

While the criticism thus made by some courts on the ground that plaintiff cannot be coerced into receiving a judgment against a tort-feasor whom he did not sue, would not seem to be sound, yet it is quite clear that, even if subdivision 2 of section 193 be employed, a "joint judgment," in the usual sense, there cannot be. Obviously, a judgment of plaintiff against defendant, and of defendant in turn against another tort-feasor, is not a "joint judgment" of plaintiff against defendant and his co-tort-feasor as that phrase is normally understood. "Joint judgment" under C. P. A., sec. 211a, must, therefore, be deemed to contemplate even separate judgments providing they result after a joint trial. While this is certainly a strained construction, it is not at all impossible that the legislature so intended, if we apply the functional standards now employed under the new rules as to joinder of parties generally.⁴² Such is the plain intimation of the *Haines* case, which justifies its decision to bring in the joint tort-feasor "so that the finding may eventuate in a joint judgment."⁴³

Similarly, the criticisms in the Westchester County Court case, levelled against the decision of the Appellate Division of the Fourth Department in *Fox v. Western N. Y. Motor Lines*,^{43a} would seem to be unjustified. The effect of the *Fox* case and the criticism made of it may be gathered from the following quotation from the *Rothman* case.

"In the *Haines* case (*supra*) the court said (p. 661): 'It was not intended, we think, that the oppor-

⁴¹ Coyle, *J.*, in *Rothman v. Byron*, County Court, Westchester County, N. Y. L. J., Oct. 30, 1931.

⁴² C. P. A. §211. It is enough that there are common questions of law or fact. *Akely v. Kinnicut*, 238 N. Y. 466, 144 N. E. 682 (1924); *Ader v. Blau*, 241 N. Y. 7, 148 N. E. 771 (1925); *Sherlock v. Manwaren*, 208 App. Div. 538, 203 N. Y. Supp. 709 (4th Dept. 1924).

⁴³ *Haines v. Bero*, *supra* note 37, at 333, 334, 243 N. Y. Supp. at 657, citing *Sherlock v. Manwaren*, *supra* note 42.

^{43a} 232 App. Div. 308, 249 N. Y. Supp. 623 (4th Dept. 1931).

tunity of a defendant to utilize that right should depend solely upon the will of a plaintiff.'

In reasoning thus the learned court led itself into an entirely different situation, which was later presented in the *Fox* case (*supra*). There the plaintiff had executed a conditional release of one of two joint tort-feasors for a valid consideration. In other words, he had settled his claim against the one and brought suit against the other. The defendant thereupon brought in and made a party defendant the man with whom the plaintiff had settled and to whom the plaintiff had given a release. The learned court was then compelled to hold that the release was ineffective to prevent the defendant from bringing in the released party for the purpose of recovering from him his *pro rata* share of any judgment that might be rendered, and this despite the fact *that the plaintiff thereby necessarily receives a money judgment contrary to his wish* and against a person whom he has released. The effect of such an interpretation of section 211a will be to prevent the settlement of claims for personal injuries or property damage wherever there is any other person or persons against whom, by any stretch of the imagination, the plaintiff might make a claim. No defendant could ever buy his peace and accept a conditional release. It would be unsafe for him to do so. And this, it seems to me, is contrary to public policy."⁴⁴

But it has always been quite settled that no act of the creditor could in any way affect the rights of contribution between the debtors.⁴⁵ Even the old Debtor and Creditor Law so expressly provided.⁴⁶ There is nothing in these conclusions which can be said to be against public policy. Indeed, section 233 of the present statute expressly provides

⁴⁴ *Supra* note 41.

⁴⁵ WILLISTON, *op. cit.* *supra* note 4, §342.

⁴⁶ *Supra* note 23, DEBTOR AND CREDITOR LAW (old) §233: "A joint debtor, including a partner, who has not compounded may require the compounding debtor to contribute his ratable portion of the joint debt, or of the partnership debts, as the case may be, as if the latter had not been discharged."

that the co-obligor who has not compounded shall receive the benefit of the payment made by the obligor upon that portion of the liability as to which the co-obligor was liable as principal (not as surety). If this be just as to contractual joint obligors, it is quite as just with respect to joint tort-feasors. In any event, whatever may be thought of the general right of contribution, the statute is plain enough in embracing tort-feasors within the principle that no joint tort-feasor can arrogate to his sole benefit any settlement which he has made. If it were otherwise, joint contractors would no longer be beneficiaries of this rule either, for no distinction is made in the statute between contract and tort obligors. But such a thought is not possible.

Indeed, *Fox v. Western New York Motor Lines* ^{46a} distinctly shows the dawning of judicial recognition, that section 211a of the Civil Practice Act is not an isolated statute, but must be read in the light of the new amendment to Article 8 of the Debtor and Creditor Law, for, in this case, we find specific reference to the Debtor and Creditor Law, and an express approval of identical treatment of joint obligations in tort with that accorded to joint obligations in contract. It is with a true appreciation of the inevitable effect of section 211a, that Sears, P. J., says:

"When a joint tort occurs, a right of contribution among the joint tort-feasors arises *forthwith*, under the provisions of section 211a, Civil Practice Act, as we construe it, despite its procedural language, but the right, as we said above, is inchoate. It is, none the less, real and subsisting. It is incident, in a sense, to the injured person's right of recovery." ^{46b}

Inspired gropings are these, undoubtedly prompted by a delicately attuned judicial instinct searching for the elusive substantive law change which created the right of contribution among tort-feasors not *in pari delicto*.

^{46a} *Flenner v. Southwest Mo. R. R. Co.*, 221 Mo. App. 160, 290 S. W. 78 (1927), referred to in the opinion, is not analogous. It is like *Price v. Ryan* herein discussed. Furthermore, as far as we know, the UNIFORM JOINT OBLIGATIONS ACT has not been enacted in Missouri. See also note 55 *infra*.

^{46b} *Supra* note 43a, at 312, 249 N. Y. Supp. at 628.

The final criticism levelled at the *Haines* case, again in the Westchester County Court opinion, is that:

"Then, too, if section 211a does confer a substantive right of contribution 'when a joint tort occurs,' would not one defendant have a right to appeal a judgment based upon a verdict of a jury which found him liable and exonerated a co-defendant? In other words, If he has the right to contribution as soon as the tort occurs, and a trial results in a judgment in favor of the plaintiff against himself alone and in favor of his co-defendant against the plaintiff, which judgment is contrary to the evidence, would he not have the right of appeal against his co-defendant? If the *Haines* case (*supra*) and the *Fox* case (*supra*) are sound it would seem to follow that the right of appeal would necessarily lie between the defendants themselves in such a case. Yet the Court of Appeals has held otherwise, *Price v. Ryan*.⁴⁷

There the court said: "* * * The defendant Ryan has no standing to complain that the jury found a verdict against himself alone. The Civil Practice Act (211a) in furnishing to one joint tort-feasor a remedy for the recovery of contribution from the other, expressly confines the remedy to cases where a money judgment has proceeded against both. At common law Ryan would have had no cause of action in contribution. Under the statute he has none, since no judgment against his joint tort-feasor has been had.'"

We fail to see the validity of this objection. *Price v. Ryan*, referred to, does not remotely touch the question at issue. No question of contribution was involved. The sole issue was as to whether one joint tort-feasor could urge that a judgment against him should be reversed because judgment had gone in favor of another tort-feasor. That the appellant has no standing on this ground is quite well settled.⁴⁸ Section 211a did not afford him any refuge, because

⁴⁷ 255 N. Y. 16, 173 N. E. 907 (1930).

⁴⁸ *Popham v. 23rd St. Ry. Co.*, 48 Super. Ct. 229, *aff'd* 89 N. Y. 63 (1882).

there was neither a judgment against him nor had he paid any part of any judgment against him. The statute, therefore, had no application. In any event, it is inconceivable that the failure of a jury to inculcate both defendants can have any effect in a court reviewing questions of law only, whatever might be possible in a court having power to reverse because a verdict is against the weight of evidence. It was entirely possible that the jury decided that appellant and the other tort-feasor were not *joint* tort-feasors at all, and that therefore only one was liable.

Assuming that there is an independent obligation of contribution between joint tort-feasors, however created, there is no difficulty with the rule exemplified by the *Haines* case, *i.e.*, permitting a defendant tort-feasor to bring in a joint tort-feasor as a party to the action under subdivision 2 of section 193, though it does require a rather strained construction of the concept of a "joint judgment." In this respect, the decision represents the normal reaction of a liberal court to the harshness and discrimination of a statute which apparently (though—under this construction—not really) makes the right of contribution dependent on the whim of the plaintiff. In place of that most uncertain standard, there is, thus, created a more stable, though still uncertain, one, *i.e.*, the sound discretion of a court, to be exercised on a motion to bring in a third person as a party to the action. But the uncertainty is only as to whether relief can be had in the same action, for otherwise, an independent action may be commenced.

But, assuming that there is no independent obligation of contribution, insofar as the *Haines* case permits the bringing in of a party, who "will be" liable only if the motion to implead him is granted, we are unable to experience any feeling of satisfaction, for, in this manner, the injustice is lessened only in degree. If the so-called right of contribution is thus converted into a privilege to be dispensed as a favor in the exercise of the discretion of a court, no matter how sound that discretion may be, it is still an amazing statute. The right of a defendant to receive the benefit of contribution, or the obligation of a third person to be subject to contribution, should be subject neither to the whim of a plaintiff

nor to the discretion of any court. The right becomes less "of a phantom nature"^{48a} only in degree when we substitute judicial discretion for the "whim of a plaintiff." Rights and obligations should depend on rules of law operating equally with respect to all, and not varying with whatever may happen to be the views of the particular court whose discretion is to be exercised.

Accordingly, though the decision in the *Haines* case, and of those authorities following it, is quite praiseworthy as an amelioration of what is otherwise an arbitrary statute—yet unless indeed there has been a substantive law change, it leaves much to be explained and fails to satisfy the inquiring mind that the true principle has been grasped, or that C. P. A., section 211a, so interpreted and applied, is not utterly void by reason of arbitrary and unjust discrimination.

E.

DEUTSCHER V. CAMMERANO⁴⁹

This is the only consideration of the proper construction of section 211a of the Civil Practice Act by the Court of Appeals. The precise question decided was that a defendant who found himself and a joint tort-feasor cast in judgment, subsequent to the enactment of the statute, for a tort which occurred prior to its enactment, could obtain contribution from the joint tort-feasor thus bound by the same judgment, because the statute was to be deemed a remedial change and therefore retroactive.

The court said:

"The effect of this amendment as to two joint tort-feasors who are financially responsible is the same as if it changed the plaintiff's remedy in the collection of a judgment by providing that each joint tort-feasor was liable only for his pro rata share of the judgment. This would be a change in the remedy and

^{48a} *Fox v. Western N. Y. Motor Lines*, *supra* note 43a.

⁴⁹ 256 N. Y. 328, 176 N. E. 412 (1931).

affect no substantial rights, at least, create no new ones. The same result is accomplished by the provision that if the plaintiff collects all the judgment out of one the other must pay his share to that one" ^{49a} (pp. 330, 331).

This, it will be observed, is exactly contrary to the reasoning of the Appellate Division of the Fourth Department in the *Haines* case, to the effect that section 211a created a *substantive* right. Indeed, the same court, in *Tirpaeck v. Sweet*,⁵⁰ in denying a motion to bring in a joint tort-feasor under subdivision 2 of section 193, where the tort had occurred prior to the effective date of the enactment of section 211a, did so because the statute "affects substantial rights of tort-feasor defendants *inter sese* * * * rather than mere procedure." Even "the grant of a remedy where none of any kind was available, is equivalent in substance to the creation of a cause of action * * *."⁵¹ And the judges who dissented, did not argue that substantial rights were not involved, but that discretion should be exercised to permit a joint judgment thereafter to be entered, and that, therefore, "The statute relates *in this way*"⁵² to procedure."

As applied to the facts in that case, and considering section 211a alone, the decision made in *Deutscher v. Cammerano*, would seem to leave little room for dispute insofar as any claim of interference with vested rights is concerned. Since judgment had been rendered against both defendants (who apparently were sued as joint tort-feasors by plaintiff) it is quite true that the statute (section 211a) diminished rather than increased the obligation of the defendant who had not paid any part of the judgment, in a case in which the other defendant had paid all. As was said by Judge Crane:

"When the cause of action arose in 1925 upon the tort claim there was no vested right in Cammerano that the manufacturing company should pay for his negligence contributing to the accident."⁵³

^{49a} *Ibid.* at 330, 331, 176 N. E. at 412.

⁵⁰ 231 App. Div. 353, 247 N. Y. Supp. 249 (4th Dept. 1931).

⁵¹ *Ibid.* at 353, 354, 247 N. Y. Supp. at 249, 250.

⁵² *Ibid.* italics ours.

⁵³ *Supra* note 49, at 332, 176 N. E. at 413.

But, as a general statement, torn from its context, we doubt that it can be said that section 211a affects no substantial right, but only procedure. For, is it not quite apparent that, assuming Cammerano had not been joined as a defendant, defendant would find his right to receive contribution determined only by the whim of the plaintiff, or the discretion of the court to whom he addressed his motion to bring Cammerano in as a party, and that Cammerano himself would find that, not having been sued by plaintiff who alone had any cause of action against him, his liability for contribution to another joint tort-feasor would depend on no rule of law, but, rather, on the discretion of a judge, as to whether or not he should be made a party defendant in an action brought by plaintiff against another?

If this be not interference with vested rights—and it seems clear that it is not—certainly it is a curious application of the equally vital provision of our fundamental law, that there must be equal protection of the laws, for here (if section 211a be deemed solely a procedural change, with no concurrent substantive law change), the right of a defendant to contribution and the obligation of a joint tort-feasor to pay it, depends entirely on the whim of a plaintiff or the discretion of a court.

One moment after the accident, Cammerano could not have said what his liabilities were. He would have had to refer the inquirer first to plaintiff, and then to the Supreme Court at Special Term. Nor would defendant have been in a better position. Under these circumstances, both substantive rights and obligations are created, and no appellation or characterization of the statute as procedural can obscure the fact that rights are created and obligations are imposed by a mere procedural device. Without enlarging, we conclude that any statute which predicates ultimate right to recover or obligation to pay, as between joint tort-feasors, not on the determination of facts on fixed and immutable principles of law, but within the discretion of a court, as to whether they should be applied in a particular case, lacks in the essentials required under the law of the land.

The curious result thus follows, that the *Haines* case, while highly praiseworthy as a judicial effort to eliminate

obvious injustices created by a harsh statute, results in an interpretation and application of it which, to us, seems quite unconstitutional. If, therefore, section 211a be read literally, as a procedural change, without concomitant substantive law adjustment, it is invalid.

Nothing in any of the decisions thus far—certainly, nothing said or considered in the latest pronouncement of the Court of Appeals, in the *Deutscher* case—even touches this criticism. The facts involved did not require its decision.

However, if it be the fact that either the Debtor and Creditor Law, or Civil Practice Act, section 211a, has introduced the independent and general principle of contribution between tort-feasors, then there is little difficulty with section 211a or subdivision 2 of section 193, insofar as the substantive change in the law is concerned. But there, nevertheless, remains the problem as to whether section 211a should properly be construed retroactively, so as to affect torts which occurred prior to the enactment of the statute, merely because judgment is rendered subsequent to the effective date of the statute.

To us it seems that, whatever be the view of the nature of section 211a, *i.e.*, whether it be considered as a procedural or a substantive statute, it should not be retroactive to include causes of action accruing before its enactment, though recorded in judgments entered thereafter.

Whether or not a statute is retroactive depends upon the intention of the legislature, as gathered from the enactment. To characterize the statute as affecting procedural, rather than substantive law, is not necessarily to determine the question, because such characterization, if it be of the statute as a procedural remedy, merely creates a presumption, in the absence of express language, that the statute was intended to be retroactive, but, like all other presumptions, it is subject to be overcome by the facts themselves.

Even a procedural statute may be prospective, if the legislature so intended, and this is our difficulty in following the *Deutscher* case, *i.e.*, not because it interferes with vested rights—as to which we are quite clear, in accordance with the opinion of the Court of Appeals, that such is not the

fact—but because the statute itself clearly shows that it was to be prospective only.

We have seen that section 211a was approved by the Governor on March 18th and, yet, made effective only on September 1st, of 1928, which seems a quite definite indication of the intention of the legislature, that it should affect causes of action accrued or judgments entered only on and after September 1, 1928. Otherwise, what purpose could there have been in postponing the effective date of the statute to September 1, 1928? Is it conceivable that the legislature was gravely concerned that the statute should not apply to judgments entered between March 18th and September 1st, 1928, and should only apply to judgments entered on and after September 1st, 1928—or is it not far more reasonable to suppose that it intended that even the judgments contemplated should only be with respect to causes of action which accrued subsequent to September 1, 1928? If the legislature was not willing to put C. P. A. section 211a into effect immediately, what reason is there to suppose that the statute was intended to embrace actions already commenced?

The conclusion that it was the accrual of the cause of action, and not merely the entry of the judgment, which was in the mind of the legislature, is confirmed by the observation that the Debtor and Creditor Law, which was approved by the Governor on April 6, 1928, went into effect on that date—yet, with the proviso that, “the provisions of this article shall not apply to obligations arising prior to the date it takes effect,” which was April 6, 1928.⁵⁴

Reading the statutes together—as we should, if possible—or separately, only one result would constitute the normal explanation, and that is that the legislature intended that in no event should obligations accruing prior to April 6, 1928 be affected by the new Debtor and Creditor Law, and that, even then—where the liability of a third person depended either on the Debtor and Creditor Law, or on section 211a (because such defendant third person had not been made a party to the action by the plaintiff)—not unless they were recorded in judgments entered in actions commenced on or after September 1, 1928, irrespective of whether we regard

⁵⁴ *Supra* note 6, §238.

section 211a as a procedural or substantive supplement to the Debtor and Creditor Law, or as an independent statute.

Under this interpretation, the *Deutscher* case, insofar as it is a decision that, to construe section 211a retroactively, does not interfere with vested rights, would be correct enough, but, insofar as it decides that the statute should be construed retroactively, to affect causes of action accrued prior to September 1, 1928, it does not seem to accord with the apparent purpose of the legislature—as found in both the Debtor and Creditor Law, and in section 211a—to exclude prior obligations, and to project the effective date of section 211a to a time well in the future.

CONCLUSION.

The proper construction of section 211a is, therefore, a matter of grave doubt. It undoubtedly provides for contribution between tort *judgment* debtors. By expressly referring to joint judgments in "an action for a personal injury or for property damage," it leaves no room for argument upon that point. Otherwise, the reasoning of a California Court, in interpreting a statute distinguished by this feature, would apply. That court said:

"It is beyond doubt the well-established general rule that there is no right of contribution between joint tort-feasors. Appellant contends that this rule has been changed by section 709 of the Code of Civil Procedure; but we do not think so. That section does not pretend to deal with the matter of the right of contribution between tort-feasors. Its plain intent is to simply provide that when there is a judgment against two or more defendants who are entitled to contribution from each other and one pays the whole or more than his proportion thereof, 'the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days after his payment he files with the clerk,' etc. It simply gives to a judgment-debtor *entitled to contribution* the summary remedy of using

the judgment itself to enforce the contribution, and relieves him of the necessity of pursuing some more tedious and inadequate proceeding for enforcing said contribution. It is only an amendment to the law of procedure; and the general rule is that an amendment to or provision in the law of procedure does not change the substantive law, unless the language used necessarily leads to that result. And it certainly cannot be said that the legislature while enacting section 709 as a part of the law of procedure necessarily intended to change, or did change, the fundamental principle that there is no right of contribution between joint tort-feasors."⁵⁵

But, obviously, section 211a does a great deal more than change the law of procedure, as to a joint tort-feasor not sued by plaintiff, unless, indeed, the substantive law change is accomplished elsewhere. The change, however accomplished, is not as arbitrary as it may appear to be, for, in any event, the right of contribution between joint obligors—even contractual obligors—does not arise until one of them "has paid more than his share of the original indebtedness"⁵⁶ which in actions in contract, as we have noted, is an amount fixed by agreement, and thus readily ascertainable without the necessity of a judgment, whereas, in tort actions, it is only a judgment which liquidates the liability. It is, therefore, a very reasonable requirement, as fixed by section 211a, that it is a *joint* judgment thereafter *paid* which should be the condition precedent to apportionment, *by motion in the action*. But we know of no reason whatsoever why a defendant, against whom alone a judgment for a joint tort has been rendered and paid, should not be able to recover, in a separate action, a pro rata share from a joint tort-feasor who was not made a party to the action. There are instances in which one joint tort-feasor has been permitted to sue another, to procure complete indemnity, on the ground that it was that other who was really responsible for the tort.⁵⁷

⁵⁵ Forsythe v. Los Angeles Ry. Co., 149 Calif. 569, 573, 87 Pac. 24, 25 (1906).

⁵⁶ *Supra* note 14.

⁵⁷ *Supra* note 3.

There would be no greater difficulty in permitting one joint tort-feasor, against whom alone judgment has been rendered, to sue another *in pari delicto*, for contribution with respect to the judgment which he has paid. It would be no greater strain on the word "such" as used in the last sentence of section 211a, to interpret it as referring to the preceding word "contribution" generally than it is upon the word "joint," as characterizing the type of judgment contemplated, to include a separate judgment over, of the defendant against the impleaded third person. This would be accomplishing no more than has been done by the Court of Appeals, in interpreting the word "such" in section 591 of the Civil Practice Act, as referring to the thirty days allotted for a motion for leave to appeal to that court,⁵⁸ though, strictly speaking, the time limit fixed for "such" application relates only to a motion theretofore described for leave to appeal where there is or has been or will be an application for a "stay pending appeal." In the construction of statutes words do not limit the legislative intention, but serve merely as channels through which it is expressed. Their content may be enlarged for that purpose even to the point of challenging literal translation.

Summarized, the following conclusions then seem quite justified:

1. Though the Debtor and Creditor Law is properly the repository for any and all rules of contribution between tort-feasors, and though the intention is quite plainly manifested to include within the scope of that statute at least the obligations, to their prospective creditors, of joint tort-feasors *in pari delicto* as well as of tort-feasors not *in pari delicto*, it is quite doubtful—indeed, difficult—to conclude that, as a *uniform law* it was intended by its draftsman to establish the substantive rule of contribution between joint tort-feasors. This seems so, even though much of the statute is confused and meaningless as to joint tort-feasors, if con-

⁵⁸ Pollak v. Port Morris Bank, 257 N. Y. 287 (1931).

Illustrations are not few: (concurrent) American Historical Society v. Glenn, 248 N. Y. 445, 162 N. E. 481 (1928); (fraud); People v. Mancuso, 255 N. Y. 463, 175 N. E. 177 (1931).

tribution between them was not intended. The perplexing character of this statute must be credited therefore to vague and inept formulation of standards, influenced by what were clearly the sound and desirable views of its distinguished draftsman as to the theoretical identity of the rules which should be applied—rather than to a deliberate and intended attempt to make a radical change in the substantive law without expressly so stating.

2. Section 211a may, possibly, have been intended to be based on what was mistakenly believed to be a change in the substantive law, created by the Debtor and Creditor Law. So construed there would certainly be eliminated all unjust discrimination in its application, for then contribution between joint tort-feasors *in pari delicto* would be possible, as in the case of joint contractual obligors, *i.e.*, when one had paid more than his *pro rata* share, with the quite reasonable modification that, in the case of joint tort-feasors, a prior judgment would be required to liquidate the obligation. And, in any event, the adjustment might be made in an action by motion, if a joint judgment had been rendered, thus dispensing with the necessity of another action, and pointing to the desirability of the rule now prevailing, that a defendant might avail himself of subdivision 2 of section 193, to bring in a joint tort-feasor and thus avoid circuitry and multiplicity of actions. Under this view, it would be necessary to interpret reference to "*pro rata* share" as contemplating complete indemnity between tort-feasors not in *pari delicto*.

3. But it is far more likely, more consonant with the language of the statute, and less disturbing to the standard of uniform interpretation of what was intended to be a uniform law, known in our state as the Debtor and Creditor Law, that section 211a—suggested and probably occasioned by the adoption of the new uniform law—was intended itself to create a substantive change in the law of contribution between joint tort-feasors *in pari delicto*, concurrent with and supplementary to Article 8 of the Debtor and Creditor Law by providing for adjustment between joint tort-feasors by motion in the action (when the tort-feasors appeared in the action, whether by command of plaintiff, or in the sound dis-

cretion of a court on motion of defendant), or by separate action, if the joint tort-feasors did not appear in the action. This would leave the former law of indemnity between joint tort-feasors not *in pari delicto* just as it was. The statute would thus be construed to liberalize, not to restrict, the former law. It is the mischief to be remedied which should be borne in mind.⁵⁹ Familiar parallels occur which are quite convincing.⁶⁰ This interpretation would free the statute from any objections of discrimination or of unequal and uncertain application.

This would be in accord with the decision of the Court of Appeals in the *Deutscher* case, which held the statute retroactive, because relating to procedure only to the extent that the sole objection raised and passed upon was that it interfered with vested rights. In that case, it was quite true that the liability of neither defendant was either enlarged or created by the statute, because the fact was that a joint judgment had been rendered against both of them. At the most, the statute subrogated defendant, who paid more than his share, to the rights of plaintiff who had the right, if he chose, to collect solely from the other defendant. But as applied to an attempt to enforce contribution against a tort-feasor who had not been joined originally as a defendant, the conclusion would inevitably be otherwise. In such case the statute could operate only prospectively and would create substantive rights. In such case there could be no subrogation, since plaintiff had not enforced his right to sue both tort-feasors. The defendant who paid the judgment would have nothing, therefore, which he could take from plaintiff by way of statutory assignment.

If it be said that this is a rather liberal construction, it may be said that a mysteriously drawn statute such as C. P. A. section 211a requires it. Such is the judicial function, even to the extreme of legislating by and through the process of interpretation when a statute such as C. P. A., section 211a is lanced into the void with nothing whatsoever to explain its origin or purpose. Yet here the statute is easily susceptible of the meaning we have given it. And

⁵⁹ *American Historical Society v. Glenn*, 248 N. Y. 445, 162 N. E. 481 (1928).

⁶⁰ *Seibert v. Dunn*, 216 N. Y. 237, 110 N. E. 447 (1915).

that meaning removes all question of its constitutional validity and should therefore be favored.⁶¹

If the purpose is to ascertain the intention of the legislature where the expression of its will is all but obscured from view, we need no better stated justification of what to us seems the manifest purpose of the legislature in enacting section 211a, than the following from the opinion of Judge Crane in sustaining and interpreting section 1171a of the Civil Practice Act (treating of sequestration in matrimonial actions) which was an equally malformed and apparently invalid statute:

“‘In construing a statute we have a right to consider conditions existing when it was adopted, and which it must be assumed the legislature intended to meet, and also other statutes relating to the same subject.’

* * * * *

‘When a number of statutes, whenever passed, relate to the same thing or general subject-matter, they are to be construed together and are in *pari materia*.’”⁶²

Upon this standard section 211a is the substantive law supplement to the new Joint Obligations Act contained in Article 8 of the Debtor and Creditor Law. But whether it was so intended, it will so inevitably develop. Experience as reflected by judicial decision will so fuse error with virtue that the alloy resulting will be of the strength and flexibility of tempered steel originally poured as one. The present interpretation of subdivision 2 of C. P. A., section 193, is but a manifestation of that process which has just begun. The *Fox* case⁶³ decided by the Appellate Division of the Fourth Department is the sign post of a trail now but dimly marked, which will inevitably take on the proportions of a road to recognition of the substantive principle underlying Civil Practice Act, section 211a.

JAY LEO ROTHSCHILD.

New York City.

⁶¹ *Supra* note 28.

⁶² *Ibid*.

⁶³ *Supra* note 43a.

[READER'S NOTE]

AFTER this article had been fully prepared and printed, the decision of the Court of Appeals, in *Fox v. Western New York Motor Lines, Inc.* (257 N. Y. 305), published in No. 1613 of the Official Advance Sheets, dated November 28, 1931, came to hand.

This decision reverses that of the Appellate Division, Fourth Department, in 232 App. Div. 308, 249 N. Y. Supp. 623, referred to in this article. It decides that subdivision 2 of section 193 cannot be employed to bring in a co-tortfeasor, in order to make him jointly liable to the plaintiff, with the defendant in the action, with the purpose of making applicable the provisions of Civil Practice Act, section 211a.

The proper construction of both section 211a and subdivision 2 of section 193 is, thus, finally disposed of by the highest court of the state, though, by reason of that construction, it is thought that the validity of section 211a, under the equal protection of law clause of the Constitution, may become an acute question.

This article is nevertheless printed as an exposé of the background of the subject and a review of its history and problems.